United Nations AT/DEC/1191

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1191

Case No. 1286: AERTGEERTS Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Omer Yousif Bireedo; Mr. Spyridon Flogaitis;

Whereas, on 4 March 2003, Roger Aertgeerts, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), filed an Application containing pleas which read, in part, as follows:

"II: PLEAS

7. With respect to competence and procedure, the Applicant respectfully requests the Tribunal:

...

(c) *to decide* to hold oral proceedings ...

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *to rescind* the decision of the Secretary-General not to renew the Applicant's fixed-term appointment;

(b) *to rescind* the decision of the Secretary-General rejecting the unanimous recommendation of the Joint Appeals Board [(JAB)] awarding compensation to the Applicant;

...

(d) *to order* the Applicant's reinstatement in service as from 1 September 1999;

(e) *to award* the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;

(f) *to fix* ... the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;

(g) *to award* the Applicant as cost, the sum of $7,500.00 in legal fees and $500.00 in expenses and disbursements."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 7 July 2003 and periodically thereafter until 5 December 2003;

Whereas the Respondent filed his Answer on 4 December 2003;

Whereas the Applicant filed Written Observations on 25 February 2004 and the Respondent commented thereon on 14 April 2004;

Whereas on 28 April 2004, the Respondent submitted an additional communication;

Whereas on 27 May 2004, the Applicant commented on the Respondent's communication of 14 April and, on 17 June 2004, the Respondent submitted an additional communication;

Whereas, on 2 July 2004, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined UNDP on a two-year fixed-term appointment as a Project Management Officer at the P-5 level, with the Office of Project Services (OPS), on 18 October 1992. The Applicant's appointment was subsequently extended for six months and again for three months.

On 12 April 1995, the Applicant requested that the three-month extension of his appointment be reconsidered and that he be granted a two-year appointment instead. The Applicant's 1994 performance appraisal report (PAR) rated his performance as "fully satisfactory". Effective 18 July 1995, he was granted a one-year extension of his

appointment, which appointment was subsequently extended on an annual basis, through 17 July 1999.

In July 1998, the Applicant and his supervisor completed their respective parts of the Applicant's Performance Profile for 1997. In his evaluation, the Applicant's supervisor stated that the Applicant "[deserved] highest credit," and that his achievement in completing a voluminous final report "could probably not be matched by any other Project Management Officer." Nevertheless, the supervisor expressed his concerns regarding the Applicant's relationships with clients, stating, inter alia, that "during the past year, unfortunately a number of explicit requests were received from different clients to have their projects switched to other Project Management Officers. This has become a serious issue which needs to be addressed urgently."

In his final comments on his performance Profile, the Applicant states, inter alia:

> "Over the period under consideration, my supervisor has indeed informed me verbally that such complaints existed, however, I have never seen the actual complaint, nor have I been allowed to respond directly or to assist in drafting a response. ..."

Subsequently, the Management Review Group (MRG), having noted the supervisor's generally positive assessment of the Applicant's performance, concluded that he had difficulties in dealing with his clients, "which could potentially lead to a loss of business for the Organization". The MRG did not endorse any further extension of the Applicant's contract beyond its expiration date. The MRG further stated that consultations between UNOPS and the Applicant should be held to inform the latter of his "short fall vis-à-vis the clients".

Following receipt of the MRG's comments, on 23 February 1999, the Applicant submitted a rebuttal thereof, annexing letters from clients, expressing their support. Two of these clients had been mentioned by the MRG as having requested that their projects be reassigned from the Applicant.

On 30 July 1999, the Rebuttal Panel submitted its report, determining that it was not within its mandate to evaluate the decision not to extend the Applicant's contract, however concluding that "management has been deficient, perhaps even insensitive, in the way it has dealt with the staff member's assessment and contract extensions over the past five years" and that "management could have been more systematic in documenting [the Applicant's] shortcomings and in counseling and assisting [him]".

On 31 August 1999, the Applicant separated from service.

On 19 February 2000, the Applicant requested the Secretary-General to review the administrative decision not to extend his fixed-term appointment

On 7 May 2000, the Applicant lodged an appeal with the Joint Appeals Board (JAB) in New York. The JAB adopted its report on 21 June 2002. Its conclusions and recommendations read, in part, as follows:

> *"Conclusions and recommendations*
>
> 23. In light of the foregoing, the Panel *unanimously agreed* that there was adequate evidence of exceptional circumstances to warrant a waiver of the two-month time limit in the present case.
>
> 24. The Panel also *unanimously agreed* that there was no adequate evidence of prejudice or other extraneous factors in the taking of the contested decision.
>
> 25. The Panel further *unanimously agreed* that the Appellant's PAR process for 1997 was conducted in accordance with UNDP's PAR procedure.
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> 26. Nonetheless, the Panel agreed with the PAR rebuttal panel that the UNOPS Management had failed to systematically document the Appellant's shortcomings and timely draw his attention to the need to improve his performance. The Panel thus *unanimously recommends* that the Appellant be paid one-month net base salary in effect at the time of his separation for the damages caused by such failures on the part of UNOPS Administration.
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> 27. The Panel also *unanimously recommends* that the report of the PAR rebuttal panel in the case of the Appellant be placed alongside his PAR for 1997 in his Official Status File, if this has not already been done.
>
> ..."

On 30 December 2002, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

> "... [T]he Board [has] concluded that ... Management had failed to systematically document your shortcomings and timely draw your attention to the need to improve your performance. For the damage caused to you by such failure, the Board recommended that you be paid one month net base salary in effect at the time of your separation from [service]. The Secretary-General regrets that he cannot agree with the Board regarding this issue. The record makes clear that the concerns of ... Management about your working relationships with clients were brought to your attention starting with your 1994 PAR and, according to your own statements in the file, you were subsequently informed verbally and in writing of continuing concerns. The Secretary-General has accordingly decided not to accept the Board's recommendation regarding compensation for damages."

On 4 March 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision not to extend the Applicant's appointment was tainted by prejudice and other extraneous considerations and was not adequately examined by the JAB or the Rebuttal Panel. The reasons set forth for alleging sufficient justification for not extending the appointment were not well founded and were refuted; therefore the decision cannot meet the requirements of good faith and fair dealing that are inherent in the Staff Regulations and Rules.

2. The Applicant's rights of due process were violated and there were significant procedural irregularities and undue delays in his case.

3. The Respondent failed to consider the Applicant for permanent appointment, even though he had served satisfactorily on successive fixed-term contracts for more than five years. The Respondent also failed to afford the Applicant fair consideration for other available posts.

Whereas the Respondent's principal contentions are:

1. The decision not to renew the Applicant's fixed-term appointment constituted a proper exercise of discretion.

2. The decision not to renew the Applicant's fixed-term appointment was not vitiated by improper motives or extraneous factors.

3. The Applicant is not entitled to reinstatement or compensation.

The Tribunal, having deliberated from 2 to 23 July 2004, now pronounces the following Judgement:

I. The Applicant joined the Organization on 18 October 1992, on a two-year fixed-term appointment as a Project Management Officer at the P-5 level. His contract was extended several times, until 31 August 1999, when the Applicant separated from service on the expiration of his last contract. As of 1 September 1999, the Applicant has been working for WHO's European Centre for Environment and Health.

The Applicant's service with the United Nations can be divided into two phases: the first phase, covering the period beginning with the Applicant joining the Organization and continuing through July 1998; and the second phase, covering the remaining period of the Applicant's employment with the Organization, through August 1999.

It seems that during the first period, the Applicant's supervisor had no complaints regarding the Applicant's performance. For example, his PAR for the year 1994 rated the Applicant's performance as "fully satisfactory". However, the situation seems to have changed and, in his Performance Profile for the year 1997, while stating that the Applicant deserved the "highest credit", his supervisor expressed his concerns regarding the Applicant's relations with clients. On the basis of the supervisor's assessment, the MRG, while noting the generally positive assessment of the Applicant's performance, expressed its concerns regarding the difficulties he was reportedly having in maintaining good relationships with clients. In its comments, the MRG identified specific clients who, allegedly, had been having difficulties in dealing with the Applicant. The MRG was particularly worried that these interpersonal problems could present a potential risk of loss of business for the Organization. The Applicant's last contract extension had been for a one-year period, and the MRG decided not to further renew his contract.

The Tribunal notes that the Applicant had submitted evidence from those clients cited by the MRG as having complained of difficulties in dealing with him, whereby they contradict the MRG's statement and express their appreciation for the Applicant's contribution to projects on which they had cooperated with him. These same clients provided a positive feedback regarding their work relations with the Applicant.

On 23 February 1999, the Applicant rebutted his 1997 PAR. The Rebuttal Panel concluded that the Administration had been deficient in its handling of the Applicant's assessment and contract extensions and that it could have been more systematic in documenting the Applicant's shortcomings and in counselling and assisting him.

The Applicant subsequently lodged an appeal with the JAB, challenging the decision not to renew his contract. Having considered his case, the JAB recommended that the Applicant be compensated for the Organization's failure to timely draw his attention to the interpersonal aspects of his performance, by one month net base salary. The JAB further recommended that the report of the PAR Rebuttal Panel be placed alongside the Applicant's PAR for 1997. The Secretary-General did not accept the JAB's recommendation regarding compensation.

II. It has been the long-standing jurisprudence of the Tribunal that, in general, fixed-term contracts do not carry any expectancy of renewal. The Tribunal has also repeatedly stated that the Organization does not have to provide any reason when deciding not to renew a fixed-term contract upon its expiration. However, as has also been repeatedly stated by the Tribunal, when the Administration chooses to give reasons for its decision not to renew a

fixed-term contract, the validity and acceptability of these reasons are subject to judicial review. In Judgement No. 1003, *Shasha'a* (2001) the Tribunal stated as follows:

> "II. The Tribunal has consistently held that, in general, an employee serving under a fixed term contract has no right to expect the renewal of the agreement, a conclusion dictated by staff rule 104.12(b). The Administration, in its discretion, may decide not to renew or extend the contract without having to justify that decision. Under those circumstances the contract terminates automatically and without prior notice, according to staff rule 109.7. (See Judgements No. 440, *Shankar* (1989); and No. 496, *Mr. B.* (1990).
>
> III. On the other hand, when the Administration gives a justification for this exercise of discretion, the reason must be supported by the facts. (See Judgement No. 885, *Handelsman* (1998).) Under such circumstances, the exercise of discretion is examined not under the rule enunciated in Judgement No. 941, *Kiwanuka* (1999) but for consistency between the reason offered and the evidence. ..."

In the present case, it is clear that professionally the Applicant had been highly regarded by his superiors for several years. In fact, in every aspect other than his relationship with clients, the Applicant consistently received praise from his supervisor. When the decision not to renew the Applicant's fixed-term appointment was then explained by his poor relations with clients and the financial risks involved with it, the Administration had to be able to substantiate these claims with the facts. As stated above, the Applicant had provided evidence to the contrary. The Tribunal therefore finds that the reason which served as the basis for the decision not to renew the Applicant's appointment had been disproved by the Applicant. Moreover, the Tribunal believes that the problems as identified in the report of the Rebuttal Panel, especially the failure of the Administration to document the Applicant's shortcomings and to counsel, guide, support and advise him, should have been dealt with much earlier. Rather than deciding that the Applicant's interpersonal problems were such that warranted losing a staff member who, professionally, was excellent, the Administration should have provided the Applicant with the necessary guidance to overcome this shortfall of his.

III. In view of the foregoing, the Tribunal:

1. Orders that the Applicant be paid as compensation six months' net base salary at the rate in effect at the time of this Judgement;
2. Orders that the report of the PAR Rebuttal Panel be placed alongside the Applicant's Performance Profile for 1997 in his Official Status File; and,

3. **Rejects all other pleas.**

(*Signatures*)

Julio **Barboza**
President

Omer Youssif **Bireedo**
Member

Spyridon **Flogaitis**
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**
Executive Secretary